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IN THE

# Supreme Court of the United States

PERFECT 10, Inc., a California corporation,

*Petitioner,*

v.

CC BILL LLC.; CAVECREEK WHOLESALE INTERNET EXCHANGE, d/b/a CWIE, LLC,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* CMG WORLDWIDE, INC. IN SUPPORT OF PETITIONER

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## CORPORATE DISCLOSURE STATEMENT

*Amicus* CMG Worldwide, Inc. ("CMG") has no parent, and no publicly held corporation owns 10% or more of CMG's stock

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## INTEREST OF *AMICUS CURIAE*

*Amicus* CMG Worldwide, Inc. ("CMG") is a privately held corporation that represents famous celebrities and sports stars in managing and licensing their domestic and international intellectual property.[1] CMG's past and present rosters of famous clients include more than two hundred such well-known names as Elvis Presley, Marilyn Monroe, James Dean, Marlon Brando, Humphrey Bogart, Ingrid Bergman, Sophia Loren, Duke Ellington, Ella Fitzgerald, Billie Holiday, Jackie Robinson, Vince Lombardi, Malcolm X, and Rosa Parks, to name a few. CMG has a unique perspective on how the recent effective alteration of the language of the Communications Decency Act by the Ninth Circuit will impact celebrities. We believe this perspective will be valuable to the Court in considering the pending petition for writ of certiorari. All parties have consented to the filing of this brief.

The Ninth Circuit's holding, if left as is, would devastate the ability of the owners of state-sanctioned intellectual property rights to enforce their rights. The interactive computer services at issue here provide the machinery through which third-party infringements of state-sanctioned intellectual property rights may take place. The Ninth Circuit's interpretation of the relevant

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[1] Petitioner provided minor comments on this Brief to the writer.

provisions of the Communications Decency Act will provide blanket immunity to all interactive computer services even if they directly profit from the third-party infringements, and the owners of state intellectual property rights will be effectively deprived of any remedy.

By holding that the "intellectual property" limitation set forth in Section 230(e)(2) of the Communications Decency Act applies only to "federal intellectual property," the Ninth Circuit sharply departs from sound and established principles of statutory construction and dangerously encroaches upon the ability of the owners of state-sanctioned intellectual property rights to enforce their rights. In addition, the holding deepens the gap between the reasonable interpretation of the statute and the minority of circuits following the Fourth Circuit's questionable interpretation of Section 230(c)(1). *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). CMG urges this Court to review and reverse the Ninth Circuit's holding to avoid further irreversible damage.

## SUMMARY OF ARGUMENT

By relying on the questionable holding in *Zeran* and further holding that the "intellectual property" limitation in Section 230(c)(1) applies only to "federal" intellectual property, the Ninth Circuit threatens to deprive owners of state intellectual property rights of the ability to recover

damages from those who directly profit from the infringement of such rights.

On any given day, a simple search on any search engine reveals hundreds, if not thousands, of unlicensed goods which misuse celebrity rights of publicity being sold by internet market place websites, such as eBay. In addition, a new business model of profit-making through "click ads," which are strategically placed links to sponsor websites alongside displays of celebrities' images, sound recordings, and video recordings on user-created content provider websites, undermines the value of celebrities' state intellectual property rights such as right of publicity and encroaches upon normal advertisement revenue streams which otherwise would be channeled to licensing such promotional uses.

Unifying traits among these business models, which facilitate and directly profit from infringing goods and materials are: 1) these interactive computer services hide behind the fact that they themselves are not the manufacturers or creators of these infringing products or materials; and 2) these interactive computer services abuse or rely heavily on misguided expansions of the scope of immunity that was initially created for a narrow scope of activities where certain rights of intellectual property owners may come in conflict with the protection of freedom of speech or the development of interstate commerce through the internet.

In one stroke, the misguided interpretation of the Communications Decency Act by the *Zeran* court and the Ninth Circuit in this case would establish a dangerous blanket immunity to interactive computer services which abuse such immunities and threaten to upset the critical balance carefully set by Congress between the promotion of internet services and the interests of the owners of intellectual property rights. Furthermore, the Ninth Circuit's holding significantly impairs or completely deprives the state intellectual property owners' ability to stop infringements or recover damages for them.

Unlike the immunity created by the Digital Millennium Copyright Act, 17 U.S.C. § 512, there is no requirement in the Communications Decency Act for the interactive computer services to cooperate with the intellectual property owners to terminate repeat infringers and remove infringing products or materials from their services after notification. Therefore, combined with the decision in this case, the narrow immunity is turned into perverted impunity to do whatever the interactive computer services please.

*Amicus* pleads with the Court to reverse this misguided decision in this case. First, this case presents an issue of enormous importance to owners of state intellectual property rights such as the right of publicity because the decision of the Ninth Circuit significantly impairs the ability of the owners of state intellectual property rights to combat rampant online infringement. Second, the Ninth Circuit badly misconceives the public

policy rationale behind the relevant sections of the Communications Decency Act and misapprehends the impact of expanding the scope of immunity.

## ARGUMENT

### I. THIS CASE PRESENTS AN ISSUE OF ENORMOUS IMPORTANCE TO OWNERS OF STATE INTELLECTUAL PROPERTY RIGHTS SUCH AS THE RIGHT OF PUBLICITY BECAUSE THE DECISION OF THE NINTH CIRCUIT SIGNIFICANTLY IMPAIRS THE ABILITY OF THE OWNERS OF STATE INTELLECTUAL PROPERTY RIGHTS TO COMBAT RAMPANT ONLINE INFRINGEMENTS.

The right of publicity is a state intellectual property right, which allows a person to control the manner in which attributes of his or her own identity may be commercially utilized, if at all.[2] A commercial use of

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[2] "The right of publicity, like copyright, protects a form of *intellectual property* that society deems to have some social utility. Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's

attributes of a person's identity usually takes place in the form of appearance in an advertisement, merchandising, or celebrity branding. Famous celebrities such as Martha Stewart and Tiger Woods command handsome compensations for commercial uses of their identities, and celebrities such as Elvis Presley and Marilyn Monroe have retained strong marketing values for such commercial uses even after death. Sophisticated marketing strategies are utilized to maximize the revenues from such commercial use of these celebrities while trying to maintain premium values of the corresponding celebrity brands. Often, such development and maintenance of the values of celebrities require at least equal, if not more, amount of care required of the management of famous trademarks or brands, such as Starbucks or Cadillac.

Like the owners of famous brand names who have to battle countless counterfeit products,[3] these celebrities

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identity."*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001)(emphasis added).

[3] "Nine Convictions for Selling $30 Million of Counterfeit Software on eBay. 6/22/07." *See* Bush Administration Accomplishments and Initiatives, U.S. Dep't of Commerce, Strategy Targeting Organized Piracy (STOP!) (September 2007), http://www.stopfakes.gov/pdf/Memo_STOP_Sheet_September_2007.pdf ; "In September 2004, over $56 million in counterfeit Microsoft software was seized and 11 people in California, Texas, and Washington were charged with manufacturing counterfeit software and counterfeit packaging." Press Release, U.S. Dep't of Commerce, Strategy Targeting Organized Piracy (STOP!)(Oct. 5,

have to battle countless unlicensed products which try to take a free ride on the hard earned good will and recognition of these celebrities. These unlicensed products pose serious threats to the intellectual property owners in three prominent ways: 1) in their sheer quantity; 2) in their competitive edge from not having the overhead of royalty payments; and 3) in disruption of the management and control and reduction in ultimate commercial value.

First, in terms of volume of infringements, on any given day, for just about any famous celebrity, hundreds, if not thousands, of infringing materials can be found on internet market place sites such as eBay and YouTube. Despite the magnitude of infringements that take place daily on these sites, these sites typically require the owners of intellectual property rights to submit a list of infringing products, identifying infringing products by identification numbers, the intellectual property they infringe, and the type of infringements to be removed from the listing on their sites. Even after all that, the infringers are then free to turn around and re-list or upload the very same infringing items again, meaning that in all practicality, rights holders have no remedy at all and no deterrence against infringers.

Secondly, combined with the sheer volume of these infringements, these unlicensed products, which often

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2004), http://www.commerce.gov/opa/press/Secretary_Evans/2004_Releases/October/05_STOP_FactSheet.htm.

compete directly with properly licensed products and have a tremendous competitive edge from the absence of royalty overhead, seriously threaten the market order and the economic viability of the law-abiding businesses selling properly licensed products, and hence threaten the lawful business model of licensing.

Finally, these unlicensed products interfere with carefully planned marketing strategies, which guide and shape the development of the celebrities as valuable brands. At times, marketing decisions are made to target only luxury or rare-item markets or conversely to target the mass market, which provides the advantage of quantity. The availability of cheap, low-quality products that carry the name or image of the celebrities lowers the value of the particular celebrity as a brand, when high-end marketing strategy is employed. Furthermore, the emergence of the new "click ad" business model on "user-created content" provider websites, such as YouTube, encroaches upon the value of the celebrity in a traditional advertisement market, as the frequency of appearances of celebrities in association with low-quality, shady products and services significantly reduces the commercial value of the celebrity for the advertisement market.

The Ninth Circuit's decision in this case threatens the very ability to combat these infringements by the owners of the state intellectual property rights by affirming the questionable existence of the immunity in Section 230(c) of the Communication Decency Act

granted to interactive computer services created by the *Zeran* decision and by evicerating the intellectual property exception, by limiting this immunity to only *federal* intellectual property.

## II. THE NINTH CIRCUIT BADLY MISCONCEIVES THE PUBLIC POLICY RATIONALE BEHIND THE RELEVANT SECTIONS OF THE COMMUNICATIONS DECENCY ACT AND MISAPPREHENDS THE IMPACT OF GRANTING SUCH EXPANSION OF THE SCOPE OF IMMUNITY.

Section 230(c) of the Communications Decency Act, 47 U.S.C. § 230(c), is entitled, "Protection for 'Good Samaritan' blocking and screening of offensive material." Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The *Zeran* court took this definitional statement and turned it into an immunity, absolving interactive computer services of all tort liabilities. "By its plain language *§ 230* creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran*, *supra*, 129 F.3d at 330.

A more reasonable reading of Section 230(c) would lead to the conclusion that the only part of Section 230(c)

which contains any grant of immunity is Section 230(c)(2), entitled "Civil liability," which provides:

> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(1).

The intention of Congress in establishing the immunity laid out in Section 230(c), however, is clear from Representative Cox's statement:

> Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the

> Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet ... ."

141 Cong. Rec. H8469-H8470 (daily ed. Aug. 4, 1995).

In short, Section 230(c) was added to shield the interactive computer services who are implementing self-regulation of indecent materials from liabilities, not to shield interactive computer services engaged in vicarious infringement from liability. The *Zeran* court read unsubstantiated immunity into the definitional statement of this limited scope of immunity given to the few self-regulating online services and created a blanket immunity for all interactive computer services acting as publishers of third-party materials from any tort liabilities.

Instead of correcting this obvious misreading of the intention of Congress, the Ninth Circuit proceeded under the assumption that Section 230(c)(1) creates an immunity for interactive computer services against tort liabilities, per *Zeran*. But the Ninth Circuit went even further and held that the limitation on immunity set forth in Section 230(e)(2), which states that the Communications Decency Act shall not be "construed to limit or expand any law pertaining to intellectual property," only applies to *federal* intellectual property, because "state laws protecting 'intellectual property,'

however defined, are by no means uniform." *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007).

The consequence of this decision is that any state law intellectual property claim is foreclosed against these interactive computer services. Combined with the fact that this immunity created by the *Zeran* court is not conditional upon satisfaction of any compliance requirement such as the one provided under Section 512(i) of the Digital Millennium Copyright Act, 17 U.S.C. § 512(i) for the application of the safe harbor provisions under Sections 512(a)-(d), the decisions in *Zeran* and this case have a dangerous potential to turn an otherwise limited immunity into a perverted impunity to do whatever the interactive computer services please as pertains to any state tort liabilities.

This egregious effect of the Ninth Circuit's holding in this case can be further amplified depending on the business model in question. In case of internet market places such as eBay, the interactive computer services profit from the service fees on sales of infringing products which are traded through their websites. The Ninth Circuit's opinion may mean that right of publicity holders will have no remedy against eBay if it refuses to remove the infringing item upon notice, so such websites will have no incentive to remove infringing items. That is bad enough, but in that case, the rights owner can at least try to go after the party that posted the infringing item, provided that these interactive computer services release the identity of these infringers and the infringer is

located in the United States and is not judgment proof. But in the case of the "click-ad" business model, such as YouTube, there is no third-party infringer in case of claims of right of publicity. This sad result is occasioned because the right of publicity is infringed when a person's identity is used for commercial purpose without authorization and most of the uploaded user-created contents are not for commercial purposes of the person doing the uploading. Therefore, the infringement does not occur until the publishers of these "user-created contents" such as YouTube make a profit from "click ads" in association with the contents of these unauthorized uploads. In the absence of third-party direct infringers from whom to recover damages, the owners of state intellectual property will be completely deprived of any recourse. It is clear that the Ninth Circuit's ruling will have disastrous unintended consequences for right of publicity owners.

Finally, this complete deprivation of remedies raises serious concerns if the Ninth Circuit's interpretation as applied to this type of infringement constitutes a regulatory taking of personal property without just compensation under the Fifth Amendment. U.S. CONST. amend. V.

## CONCLUSION

For all of these reasons, *amicus curiae* urges this Court to review and reverse the decision below.

Respectfully Submitted,

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